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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

BOB JONES UNIVERSITY, *Petitioner*,

versus

GEORGE P. SHULTZ, Secretary of the Treasury of The United States, and DONALD C. ALEXANDER, Commissioner of Internal Revenue, *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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I

TIMELY INJUNCTIVE RELIEF IS NECESSARY TO ADEQUATELY PROTECT EXEMPT ORGANIZATIONS.

A. *There Are Compelling Reasons For Providing Prior Judicial Review In Revocation Cases Affecting Exempt Organizations.*

Exempt organizations occupy a unique place in our society and under the Internal Revenue Code. First, they engage in a number of widely varying activities under the rather loosely worded provisions of 501(c)(3). Second, they are extremely vulnerable to destruction through loss of their advance assurance of deductibility of contributions.

Those corporate entities normally subject to taxation have one basic goal dictated by the profit motive. Certainly normal business corporations engage in a wide variety of activities but their ultimate goal, sometimes tempered by corporate and social responsibility, is to generate an adequate return for the equity owners of the business. In contrast, exempt organizations, responsible to no shareholder for profits, engage in numerous activities and promote widely divergent goals which have contributed greatly to the pluralism in American society.

To survive, an exempt organization must attract private support for its activities. Government has never compelled gifts to any exempt organization. Therefore, should any organization fail to attract sufficient support, it will perish no matter what government action may be taken for or against it. However, due to their dependence upon voluntary tax deductible contributions, exempt organizations are at the mercy of officials in the Internal Revenue Service.

Recently, it has been all too apparent that reliance solely upon the good graces of the Executive Department, indeed the Internal Revenue Service, for the protection of fundamental rights may be grossly misplaced. In *Center on Corporate Responsibility, Inc. v. Shultz, et al*, No. 846-73 (D.C. D.C. December 11, 1973), an exempt organization was given reason to believe that political pressure emanating from the White House was responsible for the refusal of the Internal Revenue Service to extend exempt status. Although primarily a refund suit, the organization sought and was granted injunctive relief.

Here the University has no information to support a contention that political pressure has resulted in the treatment it has individually received from the Internal Revenue Service. Nevertheless, the demonstrated capacity of political appointees to deal fatal blows to exempt organizations only reinforces the University's contention that meaningful and timely judicial review is necessary prior to the infliction of irreparable and often fatal harm through the withdrawal of advance assurance of deductibility of contributions.

The power the government possesses and has demonstrated its willingness to use has enormous potential. They

assert the power to eliminate in large measure the diversity that exempt organizations contribute to our society.[1]

B. *The Government's Reasons Supporting An All Inclusive Scope For The Anti-Injunction Statute Have No Weight In The Case Of Exempt Organizations.*

It is surprising, if not amusing, to find the government despairing "the very existence of government"[2] if injunctive relief is granted in cases such as this. The United States has never collected or relied upon taxes extracted from exempt organizations. The United States government has prospered and grown during the University's entire forty-odd years of existence. There are no far-reaching adverse consequences which could result from granting judicial review to exempt organizations prior to withdrawal of their advance assurance of deductibility of contributions.

The government points to alternative remedies exempt organizations may seek including procedures in the United States Tax Court. If Tax Court procedures are followed, revenues are never extracted from the exempt organization if it is successful. Thus, the dismal scene envisioned by the government of revenues being withheld is not a new result which would be occasioned by prior judicial scrutiny of exempt organization status.

Neither the government nor the exempt organization can positively point to a casual relationship between the withdrawal of advance assurance of deductibility affecting any designated exempt organization and the overall revenues of the Federal Government. The University asserts that upon withdrawal of advance assurance from any individual entity that potential donors to that entity will divert their contributions to other organizations enjoying exempt status. Presumably, the government's contention is that donors are locked

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[1]Such divergent organizations as the NAACP Legal Defense and Educational Fund, Inc., the Malcolm X Organization of Afroamerican Unity, Inc. and the Reorganized Church of Jesus Christ of Latter Day Saints are listed as exempt in Publication 78, Cumulative List of Organizations.

[2]Respondents' Brief, pp. 15, 16.

to particular organizations and that when advance assurance is removed, government revenues are increased because these donors cease making deductible contributions. However, the government can point to no concrete evidence which would support this result. Logic dictates that individuals will continue to make charitable contributions even if one of the potential beneficiaries of their charity loses its tax exempt status. In any event, the government cannot point to any definite loss of revenue it might sustain if exempt organizations are entitled to prior judicial review. Surely any such hypothetical loss cannot supply a compelling reason for inclusion of exempt organizations in the overall scope of the Anti-Injunction Statute. The mere possibility of the loss of insignificant revenues was not the basis for this Court's reasoning in *Enochs v. Williams Packing Co.*, 370 U.S. 1. Therefore, the Court's concern that the government be assured of the "prompt collection of its lawful revenues" does not provide a proper basis for withdrawal of timely judicial scrutiny in the case of exempt organizations. This is especially so where, as here, the government has managed to struggle along throughout the existence of the University without any of the tax revenues which now are said to loom so importantly on the government's fiscal horizon.

C. *There Is No Public Policy In Derogation Of The Exercise Of First Amendment Freedom Of Religion Rights.*

The government speaks of a broad national policy against segregation in *public* education which has been extended to forbid governmental aid to any program, public or private, which excludes or denies benefits to persons on the basis of race.[3] However the government does not and cannot point to any public policy infringing upon the exercise of basic First Amendment rights. The government does not dispute the fact that the University's admissions policy is an expression of its well-established religious beliefs. This Court has con-

[3]Respondents' Brief, p. 31.

sistently held that the very rights asserted by the University here are essential to our constitutional form of government. Furthermore, the University's religious beliefs as expressed in its admissions policy do not frustrate any otherwise valid national policy in favor of non-segregated education.

Hundreds of institutions of higher learning in the United States operate under the direct control of and receive direct financial support from state governments. These institutions cannot under applicable constitutional restrictions discriminate on the basis of race or religion in their admissions policies. Furthermore, the overwhelming majority of private schools receive state or federal grants and are bound by the terms of Title VI of the Civil Rights Act of 1964. Bob Jones University is unique in that it receives no money from any government and has steadfastly maintained its fundamentalistic religious beliefs and practices.

Students seeking and desiring an education at an integrated institution of higher learning have no difficulties in this country in finding such an institution in all states. Where there is no question as to state action being involved in the operation of an institution of higher learning such as is the case here, there is no reason to penalize attendance at the University.

The government relies upon *Norwood v. Harrison*, U.S. , 93 S.Ct. 2804, for the proposition that the granting of tax exempt status to the University serves as government support for its admissions policy. *Norwood* involved a Mississippi textbook loan plan which provided books for use in segregation academies in Mississippi. No freedom of religion assertions were made or ruled upon in *Norwood*. There the Court stated:

> Racial discrimination in state operated schools is barred by the Constitution and "[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish."

While this be true in the situation encountered in *Norwood*, it has no applicability here where significant First Amendment religious rights are involved. Tax exemption does not constitute constitutionally significant state inducement, encouragement or promotion, for if it did, serious establishment questions would be raised. Government cannot conduct religious services, nor can government operate a religious school. But government can and does grant churches and religious schools tax exempt status. By doing so, government exercises only "benevolent neutrality" and does not "induce, encourage or promote" any activity, religion or religiously motivated admissions policy. *Waltz v. Tax Commission*, 397 U.S. 664.

Similarly, the government argues that the University cannot be charitable under the applicable Internal Revenue Code sections because these sections are "designed to encourage organizations to perform beneficial functions which the government would otherwise have to conduct."[4] However, Constitutional prohibitions prevent government from conducting numerous functions which are conducted by recognized charitable organizations enjoying exempt status. Religious organizations have always been considered charitable.

The government refers to "charitable contributions" which are deductible under Section 170(a) and (c) (2) of the Internal Revenue Code for support for its argument that an exempt organization must be "charitable" as well as "religious" or "educational." However, Section 170(c) provides "for the purposes of this section, the term 'charitable contribution' means a contribution or gift to or for the use of—" an organization organized and operated exclusively for religious, charitable or educational purposes. The use of the term "charitable contribution" in 170(c) adds nothing to the government's argument that an organization must be charitable as well as religious or educational. Otherwise, there would be no reason for

[4]Respondents' Brief, p. 30.

the inclusion of the word "charitable" in Section 170(c) (2) (B).[5]

II

THE MEANS SUGGESTED BY THE GOVERNMENT TO LITIGATE THE UNIVERSITY'S ELIGIBILITY FOR EXEMPT STATUS ARE TOTALLY INADEQUATE

The government suggests that the University may seek a judicial determination of its exempt status by a refund suit for FUTA taxes, or by litigation brought by one of the University's contributors. In addition to these judicial avenues, the University could litigate its obligation to pay income taxes. All of these suggested avenues embody the same serious and overriding defect. No matter which route is selected the University will suffer needless irreparable harm from a loss of contributions during the time any such litigation is pending. The effects of such irreparable harm would survive even a favorable judicial determination.[6]

The government acknowledges its ability to inflict serious harm upon an exempt organization but relies upon the

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[5]Section 170 of the Internal Revenue Code, 26 U.S.C. § 170 provides in pertinent part as follows:

"(a) Allowance of deduction.—

(1) General Rule.—There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year.

• • •

(c) Charitable Contribution, defined.—

For purposes of this Section, the term 'charitable contribution' means a contribution or gift to or for the use of—

(2) A corporation, trust or community chest, fund, or foundation—

• • •

(B) Organized and operated exclusively for religious, charitable . . . or educational purposes. . . ."

[6]Upon its determination to withdraw advance assurance of deductibility of contributions, the Internal Revenue Service would cause such determination to be published. Once published, subsequent restoration of exempt status would hardly provide the complete and immediate cure to the damage already done. On October 24, 1972, The Wall Street Journal incorrectly stated that the University had lost its tax exempt status in a lead story commencing on Page 1. A subsequent retraction published October 31, 1972, is almost invisible on Page 36 nestled among over-the-counter quotations.

Williams Packing case to justify such action. However, in *Williams Packing* the injury to be suffered by the taxpayer was balanced against the potential injury to be suffered by the government through its disruption of the orderly collection of its lawful revenues. Here that aspect of *Williams Packing* over balancing in favor of the government's position, i.e., the orderly collection of revenues, is not present. Here the government can point to no compelling reason which would justify the irreparable harm which exempt organizations will suffer.

As viewed by the government, the entire advance ruling program administered by the Internal Revenue Service would be placed in jeopardy should injunctive relief be made available to exempt organizations. Exactly how the advance ruling system is thus jeopardized is unclear. Presumably, the Service would continue its ruling program on exempt organizations as well as other matters in the same manner as is presently done. Simply granting meaningful judicial scrutiny over administrative actions does not eliminate the need or the usefulness of proper agency action. Presumably in the overwhelming majority of cases, the Service's determination would be accepted. If anything, the quality of administrative action would be improved as a result of the availability of effective judicial review.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals for the Fourth Circuit should be reversed.

Respectfully Submitted,

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